SUPREME COURT OF THE UNITED STATES

No. 508.—October Term, 1967.

Thelma Levy, etc., Appellant, v. Louisiana, etc., et al.	On Appeal From the Supreme Court of Louisiana.

[May 20, 1968.]

Mr. Justice Douglas delivered the opinion of the Court.

Appellant sued on behalf of five illegitimate children to recover, under a Louisiana statute[1] (La. Civ. Code Art. 2315) for two kinds of damages as a result of the wrongful death of their mother: (1) the damages to them for the loss of their mother; and (2) those based

[1] "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

"The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

"The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

"As used in this article, the words 'child,' 'brother,' 'sister,' 'father,' and 'mother' include a child, brother, sister, father and mother, by adoption, respectively."

on the survival of a cause of action which the mother had at the time of her death for pain and suffering. Appellees[2] are the doctor who treated her and the insurance company.

We assume in the present state of the pleadings that the mother, Louise Levy, gave birth to these five illegitimate children and that they lived with her; that she treated them as a parent would treat any other child; that she worked as a domestic servant to support them, taking them to church every Sunday and enrolling them, at her own expense, in a parochial school. The Louisiana District Court dismissed the suit. The Court of Appeal affirmed, holding that "child" in Article 2315 means "legitimate child," the denial to illegitimate children of "the right to recover" being "based on morals and general welfare because it discourages bringing children into the world out of wedlock." 192 So. 2d 193, 195. The Supreme Court of Louisiana denied certiorari. 250 La. 25, 193 So. 2d 530.

The case is here on appeal (28 U. S. C. § 1257 (2)); and we noted probable jurisdiction, 389 U. S. 508, the statute as construed having been sustained against challenge both under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

We start from the premise that illegitimate children are not "nonpersons." They are humans, live and have their being.[3] They are clearly "persons" within the meaning of the Equal Protection Clause of the Fourteenth Amendment.[4]

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[2] The State of Louisiana was dismissed from the action and exceptions relating to the Charity Hospital, at which the mother was treated, were continued indefinitely. No appeal was taken with respect to either of those defendants.

[3] See Note, The Rights of Illegitimates under Federal Statutes, 76 Harv. L. Rev. 337 (1962).

[4] "No State" shall "deny to any person within its jurisdiction the equal protection of the laws."

While a State has broad power when it comes to making classifications (*Ferguson* v. *Skrupa*, 372 U. S. 726, 732), it may not draw a line which constitutes an invidious discrimination against a particular class. See *Skinner* v. *Oklahoma*, 316 U. S. 535, 541–542. Though the test has been variously stated, the end result is whether the line drawn is a rational one. See *Morey* v. *Doud*, 354 U. S. 457, 465–466.

In applying the Equal Protection Clause to social and economic legislation, we give great latitude to the legislature in making classifications. *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489; *Morey* v. *Doud, supra*, at 465–466. Even so, would a corporation, which is a "person," for certain purposes, within the meaning of the Equal Protection Clause (*Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181, 188) be required to forego recovery for wrongs done its interests because its incorporators were all bastards? However that might be, we have been extremely sensitive when it comes to basic civil rghts (*Skinner* v. *Oklahoma, supra*, at 541; *Harper* v. *Board of Elections*, 383 U. S. 663, 669–670) and have not hesitated to strike down an invidious classification even though it had history and tradition on its side. (*Brown* v. *Board of Education*, 347 U. S. 483; *Harper* v. *Board of Elections, supra*, at 669.) The rights asserted here involve the intimate, familial relationship between a child and his own mother. When the child's claim of damage for loss of his mother is in issue, why, in terms of "equal protection," should the tortfeasors go free merely because the child is illegitimate? Why should the illegitimate child be denied rights merely because of his birth out of wedlock? He certainly is subject to all the responsibilities of a citizen, including the payment of taxes and conscription under the Selective Service Act. How under our constitutional regime can he be denied correlative rights which other citizens enjoy?

Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother by appellees. These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would.[5]

We conclude that it is invidious to discriminate against them when no action, conduct, or demeanor of theirs[6] is possibly relevant to the harm that was done the mother.[7]

Reversed.

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[5] Under Louisiana law both parents are under a duty to support their illegitimate children. La. Civ. Code Ann. Arts. 239, 240 (West 1952).

[6] We can say with Shakespeare: "Why bastard, wherefore base? When my dimensions are as well compact, My mind as generous, and my shape as true, As honest madam's issue? Why brand they us With base? with baseness? bastardy? base, base?" King Lear, Act I, Scene 2.

[7] Under Louisiana's Workmen's Compensation Act (La. Rev. Stat. Ann. 23: 1231, 1252, 1253 (1964)) an illegitimate child, who is a dependent member of the deceased parent's family, may recover compensation for his death. See *Thompson* v. *Vestal Lumber & Mfg. Co.*, 208 La. 83, 22 So. 2d 842 (1945). Employers are entitled to recover from a wrongdoer workmen's compensation payments they make to the deceased's dependent illegitimate children. See *Board of Commissioners* v. *City of New Orleans*, 223 La. 199, 65 So. 2d 313 (1953); *Thomas* v. *Matthews Lbr. Co.*, 201 So. 2d 357 (La. Ct. App. 1967).

SUPREME COURT OF THE UNITED STATES

Nos. 508 AND 639.—OCTOBER TERM, 1967.

Thelma Levy, etc., Appellant, 508 *v.* Louisiana, etc., et al.	On Appeal From the Supreme Court of Louisiana.
Minnie Brade Glona, Petitioner, 639 *v.* American Guarantee & Liability Insurance Company et al.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May 20, 1968.]

MR. JUSTICE HARLAN, whom MR. JUSTICE BLACK and MR. JUSTICE STEWART join, dissenting.

These decisions can only be classed as constitutional curiosities.

At common law, no person had a legally cognizable interest in the wrongful death of another person, and no person could inherit the personal right of another to recover for tortious injuries to his body.[1] By statute, Louisiana has created both rights in favor of certain classes of persons. The question in these cases is whether the way in which Louisiana has defined the classes of persons who may recover is constitutionally permissible. The Court has reached a negative answer to this question by a process that can only be described as brute force.

One important reason why recovery for wrongful death had everywhere to await statutory delineation is that the interest one person has in the life of another is inherently intractable. Rather than hear offers of proof of love and affection and economic dependence from every person who might think or claim that the bell had

[1] See *Van Beeck* v. *Sabine Towing Co.*, 300 U. S. 342, 344–345, and cases there cited.

tolled for him, the courts stayed their hands pending legislative action. Legislatures, responding to the same diffuseness of interests, generally defined classes of proper plaintiffs by highly arbitrary lines based on family relationships, excluding issues concerning the actual effect of the death on the plaintiff.[2]

Louisiana has followed the traditional pattern. There the actions lie in favor of the surviving spouse and children of the deceased; if any; if none, then in favor of the surviving parents of the deceased, if any; if none, then in favor of the deceased's brothers and sisters, if any; if none, then no action lies. According to this scheme, a grown man may sue for the wrongful death of parents he did not love,[3] even if the death relieves

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[2] An English statute, Lord Campbell's Act, 9 & 10 Vict. c. 93 (1846), "has served as the model for similar acts in most of the states in this country." F. Tiffany, Death By Wrongful Act 5 (2d ed., 1913). The statute provided that the action "shall be for the benefit of the wife, husband, parent, and child . . . ." It is noteworthy that English and Canadian courts held the words "child" and "parent" to exclude illegitimate relationships. *Dickinson* v. *Northeastern R. Co.*, 2 Hurl. & Colt 735, 33 L. J. Ex. 91, 9 L. T. (N. S.) 299; *Gibson* v. *Midland R. W. Co.*, 2 Ont. Rep. 658. A recent comprehensive survey of American law in the field comments that "[i]f there is a general rule today, it is probably that the word "child" or "children" when used in a statute pertaining to wrongful death beneficiaries refers to a legitimate child or legitimatoe children, and thus only legitimates can recover for the wrongful death of their parents. This is merely an application of the principle that statutes patterned after Lord Campbell's Act which use the word 'kin' mean legitimate kin, and that where such statutes say 'father' or 'mother,' 'children,' 'brothers' or 'sisters,' they mean only legitimate father, mother, children, brothers or sisters." S. Speiser, Recovery for Wrongful Death 587 (1966).

[3] He may even, like Shakespeare's Edmund, have spent his life contriving treachery against his family. Supposing that the Bard had any views on the law of legitimacy, they might more easily be discerned from Edmund's character than from the words he utters in defense of the only thing he cares for, himself.

him of a great economic burden or entitles him to a large inheritance. But an employee who loses a job because of the death of his employer has no cause of action, and a minor child cared for by neighbors or relatives "as if he were their own son" does not therefore have a right to sue for their death.[4] Perhaps most dramatic, a surviving parent, for example, of a Louisiana deceased may sue if and only if there is no surviving spouse or child: it does not matter who loved or depended on whom, or what the economic situation of any survivor may be, or even whether the spouse or child elects to sue.[5] In short, the whole scheme of the Louisiana wrongful death statute, which is similar in this respect to that of most other States, makes everything the Court says about affection and nurture and dependence altogether irrelevant. The only question in any case is whether the plaintiff falls within the classes of persons to whom the State has accorded a right of action for the death of another.

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[4] Numerous Louisiana cases, reflecting the difficulty of attempting to determine the "real" interest of one person in the death of another, have insisted upon strict conformity to the required statutory relationship, and stated that the statute may not be extended by interpretation to analogous cases. *E. g., Bradley* v. *Swift & Co.*, 167 La. 249. As it happens, this Court has had occasion to recognize Louisiana's interest in strict construction. See *Mobile Life Ins. Co.* v. *Brame*, 75 U. S. 754, holding that an insurance company, having paid the insurance after the wrongful death of its insured, had no cause of action against the tortfeasor under Louisiana law.

[5] See, *e. g., Burthlong* v. *Huber*, 4 So. 2d 480; *Doucet v. Travelers Ins. Co.*, 91 F. Supp. 864. The Court speaks in *Levy* of tortfeasors going free. However, the deceased in that case left a legitimate parent. Under the Court's opinion, the right of legitimate and perhaps dependent parents to sue will henceforth be cut off by the mere existence of an illegitimate child, though the child be a self-supporting adult, and though the child elect not to sue. Incidentally, the burden of proving the nonexistence of such a child will be on the plaintiff parent. *Trahan* v. *Southern Pac. Co.*, 209 F. Supp. 334.

Louisiana has chosen, as have most other States in one respect or another, to define these classes of proper plaintiffs in terms of their legal rather than their biological relation to the deceased. A man may recover for the death of his wife, whether he loved her or not, but may not recover for the death of his paramour.[6] A child may recover for the death of his adopted parents. An illegitimate may recover for the wrongful death of a parent who has taken a few hours to acknowledge him formally, but not for the death of a person who he claims is his parent but who has not acknowledged him.[7] A parent may recover for the death of an illegitimate child he has acknowledged, but not for the death of a child he may have fathered or borne but whom he did not bother to acknowledge until the possibility of tort recovery arose.

The Court today, for some reason which I am at a loss to understand, rules that the State must base its arbitrary definition of the plaintiff class on biological rather than legal relationships. Exactly how this makes the Louisiana scheme even marginally more "rational" is not clear, for neither a biological relationship nor legal acknowledgment is indicative of the love or economic

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[6] *Vaughan* v. *Dalton-Laird Lumber Co.*, 119 La. 61. At the same time, a wife may recover for the death of a man to whom she is lawfully married, although she is not dependent on him for support and, indeed, is living adulterously with someone else. *Jones* v. *Massachusetts Bonding & Ins. Co.*, 55 So. 2d 88.

[7] In *Thompson* v. *Vestal Lumber & Mfg. Co.*, 16 So. 2d 594, aff'd, 22 So. 2d 842, the court stated: "Children referred to in this law [the wrongful death statute] include only those who are the issue of lawful wedlock or who, being illegitimate, have been acknowledged or legitimated pursuant to methods expressly established by law." Article 203 of the Louisiana Civil Code provides that children may be acknowledged by a declaration, by either or both parents, executed in the presence of a notary public and two witnesses.

dependence that may exist between two persons. It is, frankly, preposterous to suggest that the State has made illegitimates into "nonpersons," or that, by analogy with what Louisiana has done here it might deny illegitimates constitutional rights or the benefits of doing business in corporate form.[8] The rights at issue here stem from the existence of a family relationship, and the State has decided only that it will not recognize the family relationship unless the formalities of marriage, or of the acknowledgment of children by the parent in question, have been complied with.

There is obvious justification for this decision. If it be conceded, as I assume it is, that the State has power to provide that people who choose to live together should go through the formalities of marriage and, in default, that people who bear children should acknowledge them, it is logical to enforce these requirements by declaring that the general class of rights that are dependent upon family relationships shall be accorded only when the formalities as well as the biology of those relationships are present. Moreover, and for many of the same reasons why a State is empowered to require formalities in the first place, a State may choose to simplify a particular proceeding by reliance on formal papers rather than a contest of proof.[9] That suits for wrongful death,

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[8] A more obvious analogy from the law of corporations than the rather far-fetched example the Court has suggested is the elementary rule that the benefits of doing business in corporate form may be denied, to the willful, the negligent, and the innocent alike, if the formalities of incorporation have not been properly complied with.

[9] Even where liability arises under a federal statute defining rights in terms of a family relationship to the deceased, federal courts have generally looked to the law and the formalities of the appropriate State. In *Seaboard Air Line* v. *Kenney*, 240 U. S. 489, arising under the Federal Employers Liability Act, 35 Stat. 65, as amended, 36 Stat. 291, this Court relied upon the North Carolina determination that the "next of kin" of an illegitimate deceased were his half

actions to determine the heirs of intestates, and the like, must as a constitutional matter deal with every claim of biological paternity or maternity on its merits is an exceedingly odd proposition.

The Equal Protection Clause states a complex and difficult principle. Certain classifications are "inherently suspect," which I take to mean that any reliance upon them in differentiating legal rights requires very strong affirmative justification. The difference between a child who has been formally acknowledged and one who has not is hardly one of these. Other classifications are impermissible because they bear no intelligible proper relation to the consequences that are made to flow from them. This does not mean that any classification this Court thinks could be better drawn is unconstitutional. But even if the power of this Court to improve on the lines that Congress and the States have drawn

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siblings rather than his father. In *De Sylva* v. *Ballentine*, 351 U. S. 570, arising under the Copyright Act, 61 Stat. 652, 17 U. S. C. § 1 *et seq.*, we held that the word "children" in § 24 of that federal statute should be defined by reference to California law; California law provided that an illegitimate who had been acknowledged in writing by his father could inherit from him; since the illegitimate involved in *De Sylva* had been acknowledged, we held he was included within the statutory term. Two justices, concurring in the unanimous result, argued that it was not proper to look to state law for a definition of the federal statutory term "children." Nowhere, however, was it suggested that we look to the Constitution. In *Bell* v. *Tug Strike*, 332 F. 2d 330, the Fourth Circuit looked to Virginia law to determine whether the plaintiff was a "widow" entitled to bring suit under the Jones Act, 46 U. S. C. § 688. Plaintiff had "married" her "husband" at a time when he was already married. Although the pre-existing marriage was later dissolved by divorce, after which plaintiff continued to live with the "husband," Virginia does not recognize common-law marriages. Consequently, plaintiff was held not to be a "widow." There was no suggestion that equal protection was in any way involved.

were very much broader than I consider it to be, I could not understand why a State which bases the right to recover for wrongful death strictly on family relationships could not demand that those relationships be formalized.

I would affirm the decisions of the state court and the Court of Appeals for the Fifth Circuit.